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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DAVID STEBBINS,  
  
Plaintiff,

v.

GOOGLE LLC,  
  
Defendant.

) CASE NO.: 3:23-cv-00322-TLT  
)  
)  
) **ADMINISTRATIVE MOTION TO**  
) **STAY DISCOVERY AND INITIAL**  
) **CASE MANAGEMENT**  
) **CONFERENCE PENDING**  
) **RESOLUTION OF GOOGLE'S**  
) **MOTION TO DISMISS**

) Judge: Hon. Trina L. Thompson

) Action Filed: January 20, 2023  
)

## ADMINISTRATIVE MOTION

Pursuant to Civil Local Rules 7-11 and 16-2(d), and Federal Rule of Civil Procedure 26(c), Defendant Google LLC (“Google”) respectfully requests an order staying discovery and adjourning the upcoming Initial Case Management Conference, including all attendant deadlines, pending final disposition of Google’s Motion to Dismiss (Dkt. 31, the “Motion” or “Mot.”).

## BACKGROUND

Plaintiff, a federally-recognized vexatious litigant, filed this action on January 20, 2023. Dkts. 1, 5. As detailed in Google’s Motion to Dismiss, a third-party individual created a YouTube channel—called “Acerthorn The True Acerthorn”—that was critical of Plaintiff, and which used as its “channel icon” a snapshot of Plaintiff’s face, copied from a “Livestream” video that Plaintiff had previously posted on YouTube. Mot. at 7-9. Plaintiff alleges that the channel icon is a “prima facie copyright infringement” of his Livestream. *Id.* He asserts a claim against Google (the parent company of YouTube) for vicarious copyright infringement. *Id.*

On March 6, 2023, Google filed a Motion to Dismiss with prejudice, on the grounds that the channel icon at issue is plainly a “fair use” of Plaintiff’s Livestream under the four-factor test set forth in Section 107 of the Copyright Act, 17 U.S.C. § 107. Mot. at 9-19. Google also requests that the Court declare Plaintiff a “vexatious litigant,” as his home district has already done. *Id.* at 19-25. Plaintiff’s opposition is due **March 21, 2023**, and Google’s reply is due **March 28, 2023**. The Court has scheduled a hearing for **July 11, 2023**, although Google believes that the Motion can be resolved on the papers. Dkt. 33.

Prior to Google filing its Motion to Dismiss, the Court had already scheduled an Initial Case Management Conference (“CMC”) for **April 20, 2023**. Dkt. 24. In advance of that CMC, the parties must meet and confer by **March 30, 2023** and file a Rule 26(f) report by **April 13, 2023**. Dkts. 4, 24.

To avoid unnecessary burden on the parties and the Court, Google respectfully requests that the Court stay discovery and adjourn the CMC, including all attendant deadlines, until after it rules on Google’s Motion to Dismiss. As described below, a stay is appropriate because the Motion, if granted, will dispose of the entire case with prejudice. A stay is particularly warranted

1 given Plaintiff's decade-long history of abusive litigation tactics, including filing frivolous  
2 motions that drain judicial and party resources (which he has already done in this case).

### 3 ARGUMENT

#### 4 **A. District Courts Have Broad Discretion to Stay Discovery Pending Resolution** 5 **of a Dispositive Motion**

6 "A district court has broad discretion to stay discovery pending the disposition of a  
7 dispositive motion." *Hamilton v. Rhoads*, 2011 WL 5085504, at \*1 (N.D. Cal. Oct. 25, 2011); *see*  
8 *also, e.g., Little v. City of Seattle*, 863 F.2d 681, 685 (9th Cir. 1989) (as amended) ("The district  
9 court has wide discretion in controlling discovery."). Under Federal Rule 26(c), "[t]he court may,  
10 for good cause, issue an order to protect a party or person from annoyance, embarrassment,  
11 oppression, or undue burden or expense[.]" *Arcell v. Google LLC*, 2022 WL 16557600, at \*1  
12 (N.D. Cal. Oct. 31, 2022) (quoting Fed. R. Civ. P. 26(c)(1)). Courts in this District apply a two-  
13 prong test to determine whether good cause exists to stay discovery pending resolution of a  
14 dispositive motion. *Yamasaki v. Zicam LLC*, 2021 WL 3675214 (N.D. Cal. Aug. 19, 2021). "First,  
15 the moving party must demonstrate that the pending motion is potentially dispositive of the entire  
16 case, or at least dispositive on the issue at which discovery is directed." *Id.* at \*1 (citation omitted).  
17 "Second, the court must determine whether the pending motion can be decided absent discovery."  
18 *Id.* (citation omitted). Courts routinely grant motions to stay where the two-factor test is satisfied,  
19 as it is here. *See, e.g., Hamilton*, 2011 WL 5085504, at \*1 (granting motion to stay where motion  
20 to dismiss was "potentially dispositive of the case" and discovery was "unnecessary for resolution  
21 of the motion"); *Arcell*, 2022 WL 16557600, at \*2 (same); *Yamasaki*, 2021 WL 3675214, at \*2  
22 (same); *Hall v. Tilton*, 2010 WL 539679, at \*2 (N.D. Cal. Feb. 9, 2010) (same); *Cal. Crane Sch.,*  
23 *Inc. v. Google LLC*, 2022 WL 1271010, at \*1 (N.D. Cal. Apr. 28, 2022) (same).

#### 24 **B. The Two-Factor Test for Staying Discovery is Satisfied Here**

25 Google's Motion to Dismiss, if granted, will dispose of this case. The Complaint asserts a  
26 single claim for vicarious copyright infringement. Mot. at 9. Vicarious infringement is a form of  
27 secondary copyright infringement. *Id.* To establish secondary infringement, Plaintiff must first  
28 establish that the Acerthorn The True Acerthorn channel directly infringed his alleged copyright

1 in the Livestream. *Id.* Section 107 of the Copyright Act, however, provides that “the fair use of a  
 2 copyrighted work ... for purposes such as criticism [or] comment, ... is not an infringement of  
 3 copyright.” 17 U.S.C. § 107. Accordingly, if the challenged image is a fair use of Plaintiff’s  
 4 Livestream, as Google contends, there is no direct infringement and Google cannot be liable for  
 5 secondary infringement. Mot. at 9-10. That satisfies Factor One. *See, e.g., Arcell*, 2022 WL  
 6 16557600, at \*1 (“Defendants have established that their motion is ‘potentially dispositive’ of the  
 7 entire case, which weighs in favor of granting a stay of discovery until the Court issues a ruling on  
 8 Defendants’ motion to dismiss.”) (citation omitted); *Hall*, 2010 WL 539679, at \*2 (first factor  
 9 satisfied where “motion to dismiss, if meritorious, will dispose of the entire case”).

10 Factor Two is also satisfied because Google’s Motion can be decided without discovery.  
 11 Although fair use is a mixed question of law and fact, courts routinely dismiss copyright  
 12 infringement claims under Rule 12(b)(6) where it is apparent from the face of the complaint, and  
 13 from the materials incorporated by reference, that the challenged conduct is fair use. Mot. at 10-  
 14 11 & n.5 (collecting cases). Plaintiff’s Livestream, the Acerthorn The True Acerthorn channel,  
 15 and the allegedly infringing image are all directly referenced and described in the Complaint. *Id.*  
 16 at 7-9. For good measure, Google’s Motion includes copies and/or hyperlinks for all content at  
 17 issue—including the allegedly-copyrighted Livestream, the allegedly-infringing channel icon, and  
 18 the web pages on which both items appeared. *Id.*; *see also* Dkts. 31-1 and 31-2. These materials  
 19 are properly before the Court and, along with the Complaint itself, are all this Court needs to decide  
 20 the Motion. *See, e.g., Cal. Crane*, 2022 WL 1271010, at \*1 (second factor satisfied where no  
 21 additional discovery was needed to resolve potentially-dispositive motion).

### 22 **C. All Other Relevant Considerations Favor a Stay**

23 In evaluating whether to stay discovery pending a dispositive motion, courts may also  
 24 consider (i) whether a stay will promote judicial economy and prevent undue burden and expense;  
 25 (ii) whether any party will be prejudiced by a stay; and (iii) whether a “preliminary peek” at the  
 26 pending motion suggests that it has merit. *See Arcell*, 2022 WL 16557600, at \*1; *Yamasaki*, 2021  
 27 WL 3675214, at \*2. Each of these considerations favor a stay here.

1 A stay will spare Google and the Court from devoting unnecessary time and resources  
 2 contending with Plaintiff's vexatious litigation tactics over a trivial case that is likely to be  
 3 dismissed. As detailed in the Motion, Plaintiff has a decade-long history of burdening the judicial  
 4 system with frivolous lawsuits and nonstop, nonsensical motions that have likely wasted thousands  
 5 of hours of judicial resources. *See* Mot. at 1-7, 19-25. He has been declared a vexatious litigant  
 6 in his home district because of this misconduct, and numerous other courts have admonished him  
 7 for the same abusive tactics. *See, e.g., Stebbins v. Stebbins*, 2013 WL 6182991, at \*1 (W.D. Ark.  
 8 Nov. 26, 2013) ("Not only has [plaintiff] filed numerous cases, but he has also filed over one  
 9 hundred motions within those cases, some of which have been repetitive, and few of which have  
 10 had any merit."), *aff'd*, 575 F. App'x 705 (8th Cir. 2014); *Stebbins v. Microsoft, Inc.*, 2012 WL  
 11 12896360, at \*1 (W.D. Wash. Jan. 13, 2012) ("[T]ime spent dealing with Mr. Stebbins' filings  
 12 prevents the Court from addressing the genuine, vexing problems that people trust the Court to  
 13 resolve quickly and fairly."), *aff'd*, 520 F. App'x 589 (9th Cir. 2013); *Stebbins v. Polano*, No.  
 14 4:21-cv-04184-JSW (N.D. Cal. filed June 2, 2021) ("*Polano*"), Dkt. 143 at 2 ("Plaintiff's  
 15 improperly filed motions preempt the use of judicial resources that might otherwise be devoted to  
 16 adjudicating the meritorious claims of other litigants."); *see also* Mot. at 19-25. In the last year  
 17 alone, he has been warned at least six times that he risks being declared a vexatious litigant in this  
 18 District. *Stebbins v. Rebolo*, No. 22-cv-00546-JSW, 2022 WL 2668372, at \*3 (N.D. Cal. July 11,  
 19 2022) ("*Rebolo*"); *Polano*, 2022 WL 2668371, at \*5 (N.D. Cal. July 11, 2022); *id.*, Dkts. 134 at 1,  
 20 143 at 1-2, and 147 at 2; *Rebolo*, Dkt. 19 at 2.

21 This Court has already seen a preview of what is to come in the absence of a stay. In this  
 22 case, Plaintiff has already filed (i) an ex parte "Motion for Protective Order" in which he  
 23 preemptively asked the Court to "protect me from having to litigate" against arguments "that I fear  
 24 [Google's counsel] will make" (Dkt. 11 at 1); (ii) an invalid "Motion to Strike" Google's Motion  
 25 to Dismiss in violation of Civil L.R. 7-3(a) (Dkt. 32); and (iii) a "Motion for Extension" that would  
 26 have indefinitely stayed his time to respond to Google's Motion to Dismiss (Dkt. 34), which was  
 27 promptly denied for lack of good cause (Dkt. 35). These motions, together with Plaintiff's broader  
 28 history, strongly suggest that if this case proceeds into discovery before a ruling on Google's

1 Motion, he will relentlessly drain party and judicial resources as he has in dozens of prior cases.  
2 Granting the requested stay will avoid this undue burden and expense. *See, e.g., Arcell*, 2022 WL  
3 16557600, at \*1 (“[T]here is good cause to stay discovery at this time because it will promote  
4 efficiency and avoid undue burden to Defendants[.]”); *Yamasaki*, 2021 WL 3675214, at \*2  
5 (“[B]oth party and judicial resources will be most efficiently used if discovery is stayed until the  
6 Court decides the pending motion to dismiss.”).

7 Nor will Plaintiff be prejudiced by a temporary stay. *Yamasaki*, 2021 WL 3675214, at \*2  
8 (granting stay where there was “minimal risk of prejudice to either party”). This is not an urgent  
9 matter: Plaintiff filed a federal lawsuit because someone posted a small picture of him on YouTube  
10 (which itself is copied from a video that Plaintiff had already posted on YouTube). Mot. at 7-9.  
11 These circumstances are trivial and unworthy of the Court’s time “addressing the genuine, vexing  
12 problems that people trust the Court to resolve quickly and fairly.” *Stebbins v. Microsoft, Inc.*,  
13 2012 WL 12896360, at \*1 (admonishing Plaintiff for filing frivolous cases and motions).

14 Finally, a “preliminary peek” at Google’s Motion to Dismiss shows that its fair use defense  
15 is strong. *Yamasaki*, 2021 WL 3675214, at \*2 (granting stay where “Defendant’s motion to  
16 dismiss presents strong arguments that Plaintiff’s causes of action” were meritless). As explained  
17 in the Motion, “criticism” is expressly identified by the Copyright Act (17 U.S.C. § 107) as a  
18 paradigmatic fair use. Another court in this District has already dismissed a virtually identical  
19 claim by Plaintiff against YouTube, finding that a channel icon of his face was “plainly fair use  
20 criticism” and that “Plaintiff’s attempt to manufacture and pursue ultimately meritless copyright  
21 infringement claims in an effort to silence online criticism smacks of bad faith and abuse of the  
22 Court system.” *Rebolo*, 2022 WL 2668372, at \*3. This lawsuit is more of the same. *See* Mot. at  
23 11-19. To prevent further “abuse of the Court system,” this Court should consider Google’s  
24 Motion before this case goes any further.

### 25 CONCLUSION

26 For the foregoing reasons, Google respectfully requests that the Court stay discovery and  
27 adjourn the Initial Case Management Conference, including all attendant deadlines, until it rules  
28 on Google’s Motion to Dismiss.

1 Dated: March 16, 2023

Respectfully submitted,

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